Supreme Court, U.S.
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No. 97-863

In the Supreme Court of the United States

OCTOBER TERM, 1997

TAI ANH PHAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the evidence of the conspirators' use of firearms, during and in relation to a conspiracy to commit a robbery, was sufficient to support petitioner's conviction under 18 U.S.C. 924(c)(1).

2. Whether the trial court's erroneous instruction regarding "use" of a firearm requires reversal of petitioner's conviction under 18 U.S.C. 924(c)(1).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 121 F.3d 149.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 1997. A petition for rehearing was denied on August 26, 1997. Pet. App. 11a. The petition for a writ of certiorari was filed on November 24, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted of conspiring to commit robbery in

violation of the Hobbs Act, 18 U.S.C. 1951, and of using firearms during and in relation to that conspiracy, in violation of 18 U.S.C. 924(c)(1). Pet. App. 4a. Petitioner was sentenced to 63 months of imprisonment on the Hobbs Act count and to a consecutive term of 60 months of imprisonment on the firearms count, to be followed by three years of supervised release. *Ibid.* The court of appeals affirmed. *Id.* at 1a-10a.

1. In May 1995, petitioner asked a criminal associate, Anthony Wright, about any possible criminal enterprise in which they could participate. Pet. App. 2a-3a. Wright said that he knew of a gun dealer, Richard Perkins, who kept a number of guns in his house. Petitioner expressed interest in robbing Perkins. Unbeknownst to petitioner, Wright contacted the Secret Service and revealed that petitioner was planning to rob a gun dealer. Meanwhile, petitioner engaged in affirmative steps toward robbing Perkins, including: (1) telephoning Perkins and pretending to be a United Parcel Service driver in order to get the exact address of Perkins' house; (2) soliciting three other criminal associates, Tuan Nguyen, Khai Bui, and Minh Le, to participate in the robbery; (3) establishing the plan for the robbery; and (4) instructing Wright to map out the area surrounding Perkins' house. Wright recorded a number of his phone conversations with petitioner during which they discussed the robbery and the eventual sale of the stolen guns. *Id.* at 3a.

Petitioner informed the members of the conspiracy that they would be using guns as part of the robbery. Pet. App. 3a. In a taped conversation, petitioner assured Wright that the other conspirators would not hesitate to subdue Perkins by any means necessary.

Id. at 3a-4a. On June 24, 1995, petitioner met with Tuan Nguyen and gave him a bag containing two handguns. Petitioner asked Nguyen to keep the handguns. On June 30, 1995, petitioner called the conspirators and told them the robbery would take place that day. Petitioner instructed Nguyen to bring the handguns and give them to Khai Bui. With the FBI following every move, Nguyen, Bui, Le, and Wright drove to Perkins' house. Petitioner did not go along. The FBI intervened just as the robbery was about to begin, arrested all of the participants, and seized the two loaded firearms. *Id.* at 4a.

2. The court of appeals affirmed petitioner's convictions, rejecting petitioner's argument that the evidence was insufficient to support his Section 924(c)(1) conviction for using firearms during and in relation to a crime of violence. Pet. App. 5a-8a.[1] The court observed that petitioner discussed the need to carry firearms during the robbery with his criminal associates, that he provided Nguyen with two loaded handguns, and that on the day of the intended robbery, Nguyen transferred the handguns to Bui, who placed them under the seat of the car in which the conspirators traveled to the intended victim's home. *Id.* at 5a. The court found that the evidence was sufficient to show that the weapons were "actively employed" during and in relation to the predicate offense of conspiracy to commit robbery. *Id.* at 5a-8a; see *id.* at 5a n.2 (noting that under *Pinkerton* v. *United States*, 328 U.S. 640 (1946), petitioner was responsible for the

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[1] The court of appeals also rejected petitioner's argument that the district court erred in declining to give a requested instruction presenting the issue of entrapment to the jury. Pet. App. 8a-10a. Petitioner has not renewed that claim here.

use of the firearms by his co-conspirators in furtherance of the conspiracy).

Petitioner argued that the firearms were not actively employed because the conspirators were arrested before the intended robbery took place. Pet. App. 6a. The court of appeals observed, however, that the predicate offense in this case was not robbery itself but the Hobbs Act conspiracy to commit robbery and that the firearms were employed during that conspiracy when they were transferred among the conspirators. *Ibid.*; *id.* at 8a. The court also held that, because the transfer of the handguns "was done in preparation for their eventual use during the robbery," the evidence established that the use of the firearms took place "during and in relation to" the conspiracy. *Ibid.*

ARGUMENT

1. Petitioner first contends (Pet. 9-15) that the evidence was insufficient to show "use" of the firearms in violation of 18 U.S.C. 924(c)(1). The court of appeals correctly rejected that claim.

The court of appeals recognized that, pursuant to the rule established in *Bailey* v. *United States*, 516 U.S. 137 (1995), the government was required to demonstrate that the handguns were "actively employed" during and in relation to the conspiracy to commit robbery. Pet. App. 5a, 8a. Viewed in the light most favorable to the government, the evidence at trial showed that: (1) petitioner discussed the need to carry firearms during the robbery with his criminal associates; (2) he provided his co-conspirator Nguyen with two loaded handguns; and (3) on the day of the intended robbery, at petitioner's direction, Nguyen transferred the handguns to Bui, who placed them

under the seat of the car in which the conspirators traveled to the victim's home. Pet. App. 4a. The fact-bound determination by the court of appeals that those particular circumstances were sufficient under *Bailey* to constitute active employment of the firearms during and in relation to the conspiracy is correct, does not conflict with the decisions of this Court or of any other court of appeals, and does not merit further review.[2]

Petitioner incorrectly asserts (Pet. 9) that the court of appeals' decision allows a person to be convicted under Section 924(c) "where the evidence shows that the firearm was merely acquired or possessed by one or more conspirators." To the contrary, the court of appeals specifically noted that "[i]f [petitioner] had merely possessed the handguns at the time of the conspiracy, even if he intended to use them during the robbery, we would be forced to vacate his conviction." Pet. App. 7a. The evidence showed far more than mere possession. The evidence showed that petitioner transferred the handguns to a co-conspirator, who, at petitioner's direction, in turn gave the weapons to the other co-conspirators, with whom petitioner had discussed using guns during the

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[2] The specific question presented in this case is not likely to recur. Petitioner was indicted before this Court's decision in *Bailey*, and the description of the Section 924(c)(1) charge in the indictment explicitly charged petitioner only with using handguns during and in relation to a Hobbs Act conspiracy to commit robbery. In light of *Bailey*, future Section 924(c) indictments arising from similar circumstances would likely explicitly refer to carrying liability under Section 924(c). Petitioner does not claim, nor could he, that the evidence at trial was insufficient to show that the weapons were carried during and in relation to the conspiracy.

robbery and who drove with the guns to the scene of the robbery. Pet. App. 3a-4a, 8a; see also C.A.J.A. 194 (petitioner's recorded statement to Wright that, if the robbery victim resisted with a gun, the victim's "gotta go"); *id.* at 418-419 (petitioner's statement to co-conspirator Minh Le that guns would be used in the robbery and that petitioner would provide them). It was "giving the firearms to a fellow conspirator" that the court of appeals found constituted "active employment" of the weapons sufficient to establish a violation of Section 924(c) during and in relation to the conspiracy. Pet. App. 8a.

Contrary to petitioner's contention (Pet. 9-14), that determination by the court of appeals does not conflict with *Bailey*, *supra*. *Bailey* addressed the meaning of "use" within the context of two cases in which drug traffickers had drugs and firearms in their possession. Mere possession of a firearm, this Court held, is insufficient to establish use. *Bailey*, 516 U.S. at 143. Instead, the firearm must have been "actively employed." *Id.* at 147.[3] The *Bailey* Court described a non-exclusive list of what constitutes active employment, including "brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire, a firearm," *id.* at 148, but the Court did not

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[3] *Bailey* makes clear that active employment must mean something other than "carr[ying]" because Congress intended each of the terms "uses" and "carries" to have "a particular, nonsuperfluous meaning." 516 U.S. at 146. Under the interpretation adopted by the court of appeals in this case, a firearm can be used without being carried, *e.g.*, when it is transferred between conspirators for intended use in the conspiracy (even if neither conspirator handles the weapon); and a firearm can be carried without being used, *e.g.*, when a conspirator keeps a gun hidden in his clothing during the conspiracy.

hold that those were the only activities that could meet the statutory requirement. See *ibid.* (explaining that the list "describe[s] *some* of the activities that fall within 'active employment,'") (emphasis added); see also *United States* v. *Hawthorne*, 94 F.3d 118, 120 (4th Cir. 1996) ("One might imagine any number of ways that a firearm may be actively employed, and the Supreme Court has enumerated a few.").[4]

The court of appeals also correctly rejected petitioner's claim, which he reasserts in passing here (Pet. 17 & n.8), that the evidence was insufficient to show that the use of the firearms was "during and in relation to" the conspiracy. As the court of appeals held:

> the nexus between the handguns and the conspiracy to commit robbery could not be closer. The transfer of the handguns was done in preparation for their eventual use during the robbery. In other words, the active employment of the hand-

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[4] Petitioner's sufficiency claim fails even under his own theory (Pet. 15) of the limits on the possible meanings of "use" in a conspiracy case. Petitioner concedes that the evidence would have been sufficient to demonstrate use under *Bailey* "had the plan called for someone to actively employ firearms during the robbery—the intended object of the conspiracy." *Ibid.* But, construed in the light most favorable to the government, the evidence established just that. The evidence showed that petitioner transferred the handguns to a co-conspirator, who, at petitioner's direction, in turn gave the weapons to the other co-conspirators, with whom petitioner had discussed using guns during the robbery and who drove with the guns to the scene of the robbery. Pet. App. 3a-4a, 8a; see also C.A.App. 194, 418-419; pages 5-6, *supra*. A trier of fact could reasonably have concluded from that evidence that the plan called for active employment of the firearms during the robbery.

> guns was in itself an overt act in furtherance of the conspiracy.

Pet. App. 8a. As discussed at pages 5-6, *supra*, the evidence showed that petitioner told his co-conspirators that he would provide them with handguns to use in the robbery. It also showed that he provided them with those handguns, which they transported to the scene of the robbery. See *id.* at 3a-4a, 8a; C.A.App. 194, 418-419. That evidence was sufficient to permit a trier of fact to conclude that the use of the handguns was "during and in relation to" the conspiracy. See *Smith* v. *United States*, 508 U.S. 223, 237-238 (1995) ("in relation to" is "expansive," means "with reference to" or "as regards," and "clarifies that the firearm must have some purpose or effect with respect to the [underlying] crime," *i.e.*, must "facilitat[e], or ha[ve] the potential of facilitating," the offense).

2. Petitioner also contends (Pet. 16-20) that his Section 924(c) conviction should be reversed because the trial court's instruction regarding "use" of a firearm was incorrect under *Bailey*,[5] and the jury therefore could not properly evaluate the conflicting evidence regarding that element of the offense. Petitioner did not object at trial that the "use" instruction did not require "active employment," nor did he raise the instructional error based on *Bailey* in his opening brief or in his reply brief in the court of appeals. Rather, in his appellate briefs he relied on

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[5] The trial court's instruction did not require the jury to find "active employment" of the firearms in order to convict petitioner for "use" under the Section 924(c) count. See C.A.App. 817-819. The "use" instruction was therefore incorrect under the rule announced in *Bailey*.

Bailey only in support of his argument that the evidence was insufficient to establish a violation of Section 924(c).[6] Because petitioner failed properly to raise the claim that the instruction was erroneous before the court of appeals and the court of appeals did not opine on that claim, the claim is not properly presented in this Court. See *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993); *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

In any event, the erroneous instruction would not require reversal of petitioner's conviction under the applicable plain error standard of review. See *Johnson* v. *United States*, 117 S. Ct. 1544 (1997); *United States* v. *Olano*, 507 U.S. 725 (1993). Ample evidence was presented to support petitioner's Section 924(c)(1) firearms conviction. As described above, the evidence showed that petitioner and his co-conspirators actively employed firearms during and in relation to the conspiracy to commit robbery by transferring the firearms among themselves and transporting the firearms to the scene of the robbery with the intent to use the weapons during the robbery. See Pet. App. 3a-4a, 8a; C.A.App. 194, 418-419; pages 5-6, *supra*. Moreover, no rational jury could have found that petitioner and his co-conspirators used the firearms without also finding facts that

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[6] Petitioner did raise the "use" instruction issue in his petition for rehearing in the court of appeals, and we are advised that the issue may also have arisen during oral argument in that court. The court of appeals had discretion to decline to address that untimely argument, see *United States* v. *Smith*, 44 F.3d 1259, 1265-1266 (4th Cir.), cert. denied, 514 U.S. 1113 (1995); *Wilson* v. *O'Leary*, 895 F.2d 378, 384 (7th Cir. 1990), and indeed the court did not address the issue in its opinion.

would conclusively establish that the co-conspirators carried the firearms.[7] See, *e.g.*, *United States* v. *Holland*, 116 F.3d 1353, 1359 & n.4 (10th Cir.), cert. denied, 118 S. Ct. 253 (1997).[8] Cf. *Carella* v. *California*, 491 U.S. 263, 266 (1989) (per curiam); *Pope* v. *Illinois*, 481 U.S. 497, 503 (1987); *Rose* v. *Clark*, 478 U.S. 570, 580-581 (1994). Petitioner asserts (Pet. 3-5, 15) that the only evidence of "use" was that petitioner

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[7] Although the indictment cited 18 U.S.C. 924(c)(1), which makes criminal both "us[ing]" and "carr[ying]" firearms during and in relation to a crime of violence, the indictment alleged that the petitioner's violation of Section 924(c) was based on the co-conspirators' use of the weapons. See C.A.App. 20. In accordance with the full text of Section 924(c), the jury was instructed on both "us[ing]" and carr[ying]." See *id.* at 817-818. Petitioner did not object to that aspect of the instruction.

[8] The courts of appeals are nearly unanimous in concluding that reversal is unnecessary when a jury's findings of guilt under an erroneous "use" instruction necessarily establish liability for "carrying" under Section 924(c). See *Holland*, 116 F.3d at 1359 & n.4; *United States* v. *Chirinos*, 112 F.3d 1089, 1096-1097 (11th Cir.), cert. denied, No. 97-5023, 1998 WL 5569 (Jan. 12, 1998), cert. denied, No. 97-5738, 1998 WL 5571 (Jan. 12, 1998); *United States* v. *Miner*, 108 F.3d 967, 969 (8th Cir.), cert. denied, 118 S. Ct. 259 (1997); *United States* v. *Taylor*, 102 F.3d 767, 771 (6th Cir. 1996), cert. denied, 118 S. Ct. 327 (1997); *United States* v. *Holmes*, 93 F.3d 289, 294-295 (7th Cir. 1996); *United States* v. *Pimentel*, 83 F.3d 55, 60 (2d Cir. 1996); *United States* v. *Price*, 76 F.3d 526, 529-530 (3d Cir. 1996). See also *United States* v. *Chen*, Nos. 95-5036, 95-5042, 1997 WL 691139, at *12-13 (4th Cir. Oct. 31, 1997) (en banc) (Williams, J., joined by Wilkinson, C.J., & Russell, Wilkins, Niemeyer & Wittig, JJ., concurring). The Fifth Circuit, the only court of appeals that has rejected that proposition, has granted rehearing *en banc* to reconsider the issue. See *United States* v. *Wilson*, 116 F.3d 1066, reh'g *en banc* granted *sub nom. United States* v. *Brown*, 123 F.3d 213 (5th Cir. 1997).

gave the firearms to co-conspirator Nguyen; that Nguyen transported the firearms home with him; that Nguyen gave the firearms to co-conspirator Bui when Bui and Wright picked up Nguyen and co-conspirator Le on the day planned for the robbery; and that the co-conspirators drove the weapons to the scene of the robbery, at which time they were arrested, and the police seized the weapons. Each of those events clearly involved "carrying." In light of the evidence presented, the error in the instructions neither affected petitioner's substantial rights nor seriously affected the fairness, integrity, or public reputation of judicial proceedings. See *Johnson*, 117 S. Ct. at 1549-1550.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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